Evidence Rules Advisory Committee
Minutes of Meeting on June 16, 2008

Present: Judge Karen Lansing, Chair; John Janis, Wyatt Johnson, Dennis Benjamin, Jessica Lorello, Michelle Points, Judge Terry McDaniel, Michael Gaffney and Cathy Derden. Judge John Stegner participated by phone. The Committee also had before it comments from members Stephen Smith and Anthony Anegon.

The meeting was convened in response to a request by the Idaho Supreme Court to consider a rule that would allow admission of medical tests, such as blood tests, X-rays, and MRIs, through the doctor that ordered and relied on the test for diagnostic and treatment purposes without requiring further foundation by the entity that conducted the tests. The request was in response to a recent criminal case, State v. Mubita, Case No, 33252, where the court held that laboratory results of a blood test were not admissible through the testimony of the doctor under the business records exception to hearsay because the doctor did not make these reports as a regular part of his business. At the same time the court recognized that the medical field has changed such that ordered tests are routinely sent out to various labs to be performed by the appropriate technicians and specialists before being sent back to the doctor. The court observed these tests are objective in type and must be trustworthy because the doctor makes life and death treatment decisions based on them.

While an affidavit certifying the results can solve the problem of admissibility, it was observed by some practitioners that obtaining such affidavits is not always easy when you are dealing with results from various labs and you must locate the right person who can do the certification. It was decided the Committee would attempt to draft a narrow rule and then vote on whether to support recommending the rule to the court.

There was also discussion as to whether the business records exception to the hearsay rule could be amended to address the problem but since that exception addresses all business records it was decided a separate rule was needed.

The committee began with the following proposed draft modeled after a rule from New York.

> **Proposed Rule 803(23). Records of medical diagnostic or treatment tests or procedures.** A written, graphic, numerical, symbolic or pictorial representation of the results of a medical diagnostic or treatment procedure or test for which foundation has been established pursuant to Rule 904, unless the source of the record or the method or circumstances of preparation indicate lack of trustworthiness. Provided, however, that a record specifically excluded from the Rule 803(8) exception to the hearsay rule, as provided in rule 803(8) (A) – (D), shall also be excluded from this exception.

Proposed Rule 904. Written, graphic, numerical, symbolic or pictorial representations of medical or diagnostic or treatment tests or procedures.

The requirement of authentication or identification as a condition precedent to admissibility of written, graphic, numerical, symbolic or pictorial representation of the results of a medical diagnostic or treatment procedure or test prepared for purposes of diagnosis or treatment and written or produced by the person or entity who conducted the procedure or test, is satisfied by a showing that

(1) the proposed exhibit contains: the name of the originating practitioner, medical facility or laboratory; the name of the patient; the date when the procedure or test was performed; and such additional identifying information as is customarily provided by the originating practitioner, medical facility, or laboratory; and

(2) at least ten days before the date of the trial of the action, or by such other time limit as may be established by a pretrial order,

(a) the proposed exhibit was received or examined by the party or parties against whom it is being offered; and

(b) the party intending to offer such graphic, numerical, symbolic or pictorial representation as a proposed exhibit served upon the party or parties against whom said proposed exhibit is to be offered, a notice of intention to offer such proposed exhibit in evidence during the trial.

Nothing contained in this rule, however, shall prohibit the admissibility of a written, graphic, numerical, symbolic or pictorial representation in evidence where otherwise admissible.

Proposed Rule 803(23).

After review and discussion of the proposed draft, it was decided by vote that:
The rule should be limited to the tests and original interpretation of those tests sent to the treating physician for purposes of diagnosis and treatment.
The rule should apply to dental tests and they should be specifically referenced.
The rule should not apply to independent medical exams conducted for a litigant or to any testing done in anticipation of or for purposes of litigation.
The rule should not apply to any type of psychological testing as that type of testing can be subjective.
The phrase "…unless the source of the record or the method or circumstances of preparation indicate lack of trustworthiness…." should be replaced with the language that is used in Rule 803(8), being "…unless the sources of information or other circumstance

indicate lack of trustworthiness…." so that the differing language would not be interpreted differently.

In addition, the Committee discussed the reference to 803(8), which is the hearsay exception for public records and reports. Rule 803(8) also lists a number of records that do not fall under the exception and the intent was to make sure the proposed rule did not allow records that were specifically excluded in 803(8). To clarify this further, the Committee voted to add the word "public" in front of "records" and to delete the reference to (A)–(D) as that gave the impression it was not all-inclusive when in fact there are no other subparts in Rule 803(8).

The Committee also discussed whether the proposed rule should apply to criminal cases or only civil cases. It was in the context of a criminal case that the issue arose and the Committee found no reason not to apply such a rule in criminal cases; for example, where a doctor might be testifying as to tests conducted in treating injuries that were inflicted. The Committee took note of the notice provision and opportunity for objection before trial. The Committee voted to recommend that any rule adopted be applicable to both civil and criminal cases.

The Committee voted in favor of the changes as reflected below:

> **Proposed Rule 803(23) Medical or dental tests and test results for diagnostic or treatment purposes**. A written, graphic, numerical, symbolic or pictorial representation of the results of medical or dental tests performed for purposes of diagnosis or treatment for which foundation has been established pursuant to Rule 904, unless the sources of information or other circumstances indicate lack of trustworthiness. This exception shall not apply to:
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> (A) psychological tests,
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> B) reports generated pursuant to I.R.C.P. 35(a),
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> (C) medical or dental tests performed in anticipation of or for purposes of litigation, or
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> (D) public records specifically excluded from the Rule 803(8) exception to the hearsay rule.

<u>Proposed Rule 904</u>.

The proposed Rule 904 set forth identifying information that would have to be on such tests and test results, as well as a notice provision. The Committee began by reviewing the first part of the rule:

> The requirement of authentication or identification as a condition precedent to admissibility of written, graphic, numerical, symbolic or pictorial representation of the results of a medical diagnostic or treatment procedure or test prepared for purposes of diagnosis or treatment and

written or produced by the person or entity who conducted the procedure or test, is satisfied by a showing that

1) the proposed exhibit contains: the name of the originating practitioner, medical facility or laboratory; the name of the patient; the date when the procedure or test was performed; and such additional identifying information as is customarily provided by the originating practitioner, medical facility, or laboratory; and . . .

Looking at the proposed opening language of the rule, the Committee first discussed whether it should reflect the language in current Rule 901, on requirement of authentication and identification, or the language in Rule 902 on self-authentication. In a 7 to 1 vote, the Committee voted to use the opening language from Rule 901, the reason being the documents are not self-authenticating; rather, the new rule sets forth a method of satisfying the authentication requirement.

It was also pointed out that the person interpreting the test may not be the same person who conducted the test, as when a radiologist interprets a film, and that the important thing was that the person or facility be identified on letterhead or in some other way. It was decided there was no need to list the items again since they could just be referenced as "items under Rule 803(23)".

The changes approved by the Committee are reflected as follows:

> The requirement of authentication as a condition precedent to admissibility of items described in Rule 803(23) is satisfied by a showing that the proposed exhibit identifies the person or entity that conducted or interpreted the test, the name of the patient, and the date when the test was performed."

Anthony Anegon sent comments to the Committee along with Washington State Rule of Evidence 904 and the Committee preferred the notice provisions contained in that rule and used it as a model for the notice provisions. The Washington Rule stated:

> (b) Notice. Any party intending to offer a document under this rule must serve on all parties a notice, no less than 30 days before trial, stating that the documents are being offered under Evidence Rule 904 and shall be deemed authentic and admissible without testimony or further identification, unless objection is served within 14 days of the date of notice, pursuant to ER 904(c). The notice shall be accompanied by (1) numbered copies of the documents and (2) an index, which shall be organized by document number and which shall contain a brief description of the document along with the name, address and telephone number of the document's author or maker. The notice shall be filed with the court. Copies of documents that accompany the notice shall not be filed with the court.

> (c) Objection to Authenticity or Admissibility. Within 14 days of notice, any other party may serve on all parties a written objection to any document offered under section (b), identifying each document to which objection is made by number and brief description.
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> (1) If an objection is made to a document on the basis of authentication, and if the court finds that the objection was made without reasonable basis, the offering party shall be entitled to an award of expenses and reasonable attorney fees incurred as a result of the required proof of authentication as to each such document determined to be authentic and offered as an exhibit at the time of trial.
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> (2) If an objection is made to a document on the basis of admissibility, the grounds for the objection shall be specifically set forth, except objection on the grounds of relevancy need not be made until trial. If the court finds that the objection was made without reasonable basis and the document is admitted as an exhibit at trial, the court may award the offering party any expenses incurred and reasonable attorney fees.

The time frame of 30 days for the notice and 14 days to file an objection was considered too short to enable the court to have a hearing and settle the matter before trial so the person proffering the documents would know what was needed. Thus, the 30 day notice was changed to 45 days. While all agreed a hearing should be held on any objection filed, the members were reluctant to set a requirement or time frame for hearing since this is an evidence rule and not a procedural rule. It will be up to the party who wants a pretrial ruling on any objection to schedule a hearing. It will also be up to that party to present a copy of the document at issue to the court.

There was also discussion as to whether the notice and documents proposed to be admitted should be filed with the court. All agreed the notice should be filed. As for the documents, while some members thought the documents should be filed for purposes of a clear appellate record, it was pointed out the documents would become part of the record when admitted or if an objection was filed and a hearing held. The consensus was that it should be treated like other discovery with the actual documents sent to the opposing party but only the notice being filed with the court. It was also agreed that any objection should be both filed and served.

The Committee reviewed subparts (c)(1) and (c)(2) of the Washington rule and thought the two subparts could be combined. The Committee agreed with a provision for expenses and fees in connection with unreasonable objections. The Committee discussed whether all objections had to be made or just objections as to authenticity and agreed with the Washington rule requiring that all objections except as to relevancy be made at this time.

The Committee also recommended leaving in the portion of the Washington rule referring to the effect of the amendment and the last statement of the proposed Idaho rule.

While one member still voted that no such rule was needed, all voted in favor of the following proposed language:

> **Rule 904. Authentication of medical or dental tests and test results for diagnostic or treatment purposes.**
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> (1) Authentication of items described in Rule 803(23). The requirement of authentication as a condition precedent to admissibility of items described in Rule 803(23) is satisfied by a showing that the proposed exhibit identifies the person or entity who conducted or interpreted the test, the name of the patient, and the date when the test was performed, and notice was given in accord with subsection (2) of this rule.
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> (2) Notice. No less than 45 days before trial, any party intending to offer a document under this rule must serve on all parties a notice, stating that the documents are being offered under this rule shall be deemed authentic and admissible without testimony or further identification, unless objection is filed and served within 14 days of the date of notice, pursuant to subsection (3) of this rule. The notice shall be accompanied by a copy of the document and a brief description of the document along with the name, address and telephone number of the document's author or maker. The notice shall be filed with the court. Copies of documents that accompany the notice shall not be filed with the court.
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> (3) Objection to authenticity or admissibility. Within 14 days of notice, any other party may object by filing and serving on all parties a written objection to any document offered under this rule, identifying each document to which objection is made. The grounds for the objection shall be specifically set forth, except objection on the grounds of relevancy need not be made until trial. If the court in a civil case finds that an objection was made without reasonable basis and the document is admitted at trial, the court may award the offering party any expenses incurred and reasonable attorney fees.
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> (4) Effect of Rule. This rule does not restrict argument or proof relating to the weight to be accorded the evidence submitted, nor does it restrict the trier of fact's authority to determine the weight of the evidence after hearing all of the evidence and the arguments of opposing parties. Nothing contained in this rule shall prohibit the admissibility of a written, graphic, numerical, symbolic or pictorial representation in evidence where otherwise admissible.

It was agreed the above language would be circulated by email to the committee for final approval and the meeting adjourned at approximately 1:30 p.m.